Supreme Court, U.S.
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No. 88-1612

IN THE

Supreme Court of the United States

October Term, 1988

DANIEL R. HODGE, M.D.,

Petitioner,

against

WALTER R. KELLY, FREDERICK R. DOWNS, M.D., RICHARD LESTER, THOMAS A. COUGHLIN III, MARIO M. CUOMO, DEPARTMENT OF CORRECTIONAL SERVICES,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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Question Presented.

Whether certiorari is warranted to review a summary judgment dismissal of an employment discrimination claim premised upon conclusory allegations of pretextual reasons for adverse employment decisions.

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BRIEF IN OPPOSITION.[1]

[1]The corrected petition, filed pursuant to a letter of the Clerk of this Court dated March 13, 1989, was received by respondents on April 3, 1989, but, pursuant to Supreme Court Rule 33.7, was docketed as of March 6, 1989, the date petitioner attempted to file the original petition.

Facts.

This suit involves the employment of petitioner, a black physician, at Attica Correctional Facility ("Attica"), a maximum security prison operated by the New York State Department of Correctional Services ("DOCS"), under the supervision of respondents Kelly and others (hereafter, "State Respondents").

Petitioner had been employed at Attica since 1983 (7, ¶ 1; 596, ¶ 15).[2] State respondents include the Prison Superintendent (Kelly), the Facility Health Services Director (Downs), the Facility Health Care Manager (Lester), the Commissioner of DOCS (Coughlin), the Governor of the State of New York (Cuomo), and the employer, DOCS (305, 566, 570, 587, 596-597, 750).

Petitioner was hired in August 1983 on a "full time" basis to deliver primary health care to inmates (596, ¶ 15). Initially, he was assigned to morning "call out", from 9:00 a.m. to 11:00 a.m., when inmates would be brought into the medical clinic (596, ¶ 15). Petitioner signed an "Institutional Practice Plan" ("IPP") which defined his employment and specified that not less than 28 hours (of the 40 for which he was compensated) must consist of "regularly scheduled on-site coverage (Monday through Friday)" (152, *see* 150-152). The IPP set the total number of work hours, but it did *not* specify *when* the hours would be worked (152, 310). Managment at Attica set the work schedules of physicians (41, 48, 49-50, 51, 53, 154, 155, 156, 158-159, 165, 167, 168, 169, 172, 176-177, 180, 181, 305).

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[2]References to numerals in parentheses are to the Appendix at the Second Circuit in *Hodge v. Kelly,* No. 88-7657. References to "App, A-1", etc., refer to the Appendix to the Petition for Certiorari.

After petitioner had been employed at Attica on a full-time basis for two years, he decided to matriculate simultaneously as a full-time law student (596, ¶ 16). Initially, Attica accommodated his law school endeavors by allowing him to change his work schedule (164). Respondent Downs switched schedules with petitioner, so that petitioner would conduct the afternoon clinic and Downs would operate the morning clinic previously run by petitioner (164). This accommodation to petitioner was accomplished by a simple memorandum, without any need for a modification of the IPP (164).

While Attica attempted to accommodate petitioner's scheduling preferences, the prison could only do so if it would not compromise the medical needs of the inmates, since there were only two physicians (Dr. Downs and petitioner), and one physician's assistant, on staff (157-158; 307, ¶ 12).

To impress upon petitioner the importance which management placed on punctuality for petitioner's attendance at the inmate clinics, respondent Lester sent petitioner a detailed memo on the subject of timely attendance when the schedules were changed to accommodate petitioner (156).

Thereafter, petitioner was frequently tardy, depriving inmates of medical care, inconveniencing prison staff, and creating security concerns (158-159). As of August 1985, after those episodes of tardiness and failure to keep to the assigned clinic hours, petitioner received adverse written performance evaluations (191, 647-649). Management documented petitioner's unsatisfactory performance in writing (194).

To prevent future disruptions of scheduling medical services, management asked petitioner to commit himself to work a specific, definite work schedule (167). Petitioner resisted those overtures and instead issued ultimatums as to hours he would work so as to facilitate his full-time law student status (168). Management declined to accept petitioner's proposal, because it would have resulted in evening hours for clinics when support staff (nurses, pharmacists, X-ray technicians) were not scheduled for work (168, 182). Management explained to petitioner that the whole prison could not alter its schedule just to suit his desires simultaneously to pursue full-time employment and full-time law school attendance (182).

Thereafter, petitioner reluctantly promised to work five days a week in the afternoons, but he refused to sign an IPP to that effect (170, 172).

On February 14, 1986, Attica changed petitioner's schedule to morning hours (176). Respondent Kelly advised petitioner that no physician at Attica had *ever* been scheduled for evening hours (176).[3]

Subsequently, petitioner took unauthorized absences from the prison to file legal papers to commence his employment discrimination lawsuit (219, 330, 348-349, 622). As a consequence of his unauthorized leaves, medical appointments for inmates were cancelled (623).

On March 4, 1986, petitioner was suspended without pay (353). A "Notice of Discipline", which proposed a

[3]Petitioner's claim that the other staff physician (respondent Downs) received preferential scheduling is without merit. Unlike petitioner, respondent Downs was "on call" 24 hours a day for emergency duty at Attica (306-308, 310). Downs was not required to be in the prison all of those hours, as long as he was readily available on short notice (306-308, 310).

penalty of dismissal from employment, alleged petitioner's insubordinate behavior for failure to submit an acceptable IPP (351-352). The disciplinary notice also alleged unsatisfactory attendance and specified that petitioner's continued failure to report for duty caused apprehension and unrest among inmates (352-353).

Petitioner pursued his administrative remedy under the collective bargaining agreement (353, 208). An arbitrator, after evidentiary hearings, found that petitioner was guilty of unsatisfactory attendance practices (233). The arbitrator reduced the penalty to a six-month suspension without pay (233). The arbitrator also found that the State had violated the collective bargaining agreement by changing petitioner's hours because of his failure to submit an acceptable IPP (233). The State was directed to reinstate petitioner with back pay minus the six-month loss of salary penalty (233). DOCS complied with the arbitrator's award forthwith (264).

Upon petitioner's return to work, he was reinstated to his afternoon work schedule (49). Security officials at Attica advised petitioner he would be expected strictly to adhere to his assigned work hours (41, 50, 627).

Within the next month, petitioner was frequently late for work (184-185). He also abused xerox privileges by copying materials unrelated to prison work (367-368). Petitioner xeroxed law school papers at DOCS expense, and he declared that Attica management had no authority to prevent him from doing so (370).

On February 11, 1987, First Deputy Superintendent Richardson met with petitioner and his union representative (51). Richardson formally ordered petitioner's work

schedule changed to 10:00 a.m. to 4:00 p.m. (51, 110, 334). Richardson explained this scheduling change as follows:

> "Your on-site work schedule is being changed to increase the amount of time you are accessible to the inmates concurrent with the time ancillary services are available to you. This will also increase the time you will be available for consult [*sic*] with the majority of our medical staff" (51, 180).

Subsequently, petitioner was tardy on numerous occasions—in material, significant respects, e.g., 35 minutes, 40 minutes, 30 minutes, 65 minutes, 50 minutes, etc. (186, 187, 625). Attica management tried to counsel petitioner about his chronic tardiness (356-358). Petitioner received detailed confirmatory memoranda documenting this counselling (356-357). He was warned that the prison must run on schedule and that tardiness for inmate medical clinics disrupted the entire facility and agitated inmates who have a right to receive medical care (356). Petitioner's response, documented in written memoranda, was his statement that "it's tough if you are late" (357). Despite those warnings, he continued to be tardy (188).

Thereafter, events unrelated to tardiness led to termination of petitioner's employment (717-718, 735-737). An inmate in cardiac arrest was brought to petitioner for emergency care, but petitioner refused to perform cardiopulmonary resuscitation on him (717-718, 735-737). The inmate died and petitioner was fired for his refusal to treat the inmate (346-347, 550-551, 717-718, 735-737, 752-753). Petitioner commenced a second (still pending) arbitration to contest the propriety of that disciplinary action (713, 748-749).

Decisions Below.

Respondents moved to dismiss the complaint pursuant to Rule 12(b)(6), F. R. Civ. P. (56-61, 285-290), but after notice to petitioner (738-741), the court received affidavits and converted the motion into one for summary judgment pursuant to Rule 56, F. R. Civ. P. (738-741, 772). The court granted defendants' motion for summary judgment in a written decision (App., A-3—A-11). The crux of the court's decision was as follows (App., A-8—A-9):

> "The court finds that plaintiff has not produced, nor would he be able to produce, sufficient evidence to show either directly or indirectly that the DOCS' stated reasons for discharging him, i.e., failure to submit an acceptable IPP, absence from work without leave, late arrival at work, and leaving assigned post without permission (see Appendix A, pp. 2-3, attached to Item 12), were merely a pretext for discrimination. These stated grounds for the actions taken by the DOCS are not in dispute, and are amply supported in the affidavits and exhibits submitted to the court. While plaintiff's pleadings and affidavits are replete with allegations of discrimination, such conclusory statements are insufficient to satisfy the requirements of Rule 56. Meiri, 759 F.2d at 998; Zahorik v. Cornell University, 729 F.2d 85, 94 (2d Cir. 1984)."

The Court of Appeals for the Second Circuit affirmed "for substantially the reasons stated by the district court" (App., A-2).

ARGUMENT.

The writ should be denied.

The courts below correctly held that petitioner's conclusory allegations of discrimination were insufficient to establish a valid claim for relief. *See,* e.g., *Meiri v. Dacon,* 759 F2d 989, 997-998 (2d Cir.), *cert. denied,* 474 US 829 (1985); *Clements v. County* of Nassau, 835 F2d 1000, 1005 (2d Cir. 1987); *see generally, Anderson v. Liberty Lobby, Inc.*, 477 US 242 (1986); *Celotex Corp. v. Catrett,* 477 US 317 (1986). Mere conclusions of pretextual employment action, do not suffice to rebut an employer's legitimate reasons for adverse employment actions. *Smith v. American Express Co.*, 853 F2d 151, 155 (2d Cir. 1988); *Anderson,* 477 US at 248-249. In any event, since legitimate security and scheduling reasons existed here (*see Dean v. Coughlin,* 804 F2d 207, 209, 213-214 [2d Cir. 1986]), even if there was any substance whatsoever to petitioner's wild allegations, the judgment should be affirmed under the "dual motivation" line of reasoning. *Mt. Healthy City School Dist. v. Doyle,* 429 US 274, 285-286 (1977) (if an employer would have taken the same action anyway for other, legitimate reasons, plaintiff has not established the requisite "causation" linking the allegedly improper action with the adverse employment decision); *Board of Trustees of Keene State College v. Sweeney,* 439 US 24, 25 & n 2 (1978) (employer does not have to prove the absence of a discriminatory motive, but instead, only evidence of legitimate nondiscriminatory reasons).

The chronic tardiness of one of two physicians at a maximum security prison (158, 165, 184-186, 258-260) is more than ample justification for the adverse employment action taken against petitioner. There is no merit to his petition for a writ of certiorari.

CONCLUSION.

The writ should be denied.

Dated: Albany, New York
April 24, 1989

Respectfully submitted,

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